

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

INTERNATIONAL SHIPPING AGENCY, INC.,
MARINE TERMINAL SERVICES, INC., and
TRUCK TECH SERVICES, INC., A SINGLE
EMPLOYER

and

UNION DE EMPLEADOS DE MUELLES
(UDEM), ILA 1901, AFL-CIO

Cases 24-CA-091723
24-CA-104185
12-CA-129846
12-CA-133042
12-CA-135453
12-CA-135704
12-CA-136480
12-CA-142493
12-CA-143597
12-CA-144073

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O'Neill), for the Respondent.
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(Marrinan & Mazzola Mardon, P.C.), for the Charging Party.

DECISION

STATEMENT OF THE CASE

ROBERT A. RINGLER, Administrative Law Judge. This case was heard in San Juan, Puerto Rico, during the summer and fall of 2015. The three complaints alleged, inter alia, that the International Shipping Agency, Inc. (Intership), Marine Terminal Services, Inc. (MTS) and Truck Tech Services, Inc. (TTS) (collectively called the Respondent) were a single employer, and violated Section 8(a)(1), (3) and (5) of the National Labor Relations Act (the Act).¹

On the entire record, including my observation of the demeanor of the witnesses, and after thoroughly considering the parties' briefs, I make the following

¹ The complaints consist of: the complaint dated July 31, 2013 (the first complaint); the complaint dated April 30, 2013 (the second complaint); and the complaint dated August 29, 2014 (the third complaint). (GC Exh. 1).

FINDINGS OF FACT²

I. JURISDICTION

Intership, a stevedoring corporation, is located in Bayamon, Puerto Rico. Annually, it purchases and receives goods exceeding \$50,000 directly from points outside of Puerto Rico. MTS repaired marine chassis and containers at its Bayamon, Puerto Rico facility. During the 12-month period ending December 31, 2012, MTS purchased and received goods exceeding \$50,000 directly from points outside of Puerto Rico. TTS repaired stevedoring vehicles and equipment at its Bayamon, Puerto Rico facility.³ During the 12-month period ending December 31, 2012, TTS purchased and received goods exceeding \$50,000 directly from points outside of Puerto Rico. Intership, MTS and TTS admit, and I find, that they are employers engaged in commerce, within the meaning of Section 2(2), (6) and (7) of the Act. They also admit, and I find, that the Union is a labor organization, within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Introduction*

This case explores whether Intership, MTS and TTS, were a single employer. It also considers whether Intership's closure of MTS and TTS, and related actions, were legitimate business actions, or unlawful efforts designed to prevent unionization.

1. Intership

Intership handles and warehouses stevedoring freight.⁴ Its main terminal is located at Pier M at the Bayamon docks. David Segarra is its President; Maria Caraballo-Gaud (Caraballo) is its Chief Financial Officer; Enrique Ivan Sosa-Perez (Sosa) is its Operations Supervisor; and Karen Figueroa is its Director of Human Resources. Intership and the Union have a longstanding bargaining relationship, and the Union serves as the exclusive representative of the following unit (the Intership unit):⁵

All cargo delivery and receiving employees, timekeepers and paymasters, pier custodians, maintenance workers (e.g. mechanics, welders, electricians and gasoline expenders), gatemen and tally clerks employed at its Bayamon, Puerto Rico stevedoring and marine terminal facility, excluding all administrative executive employees, professionals, supervisors, foremen, stevedores, guards and all other employees.

(JT Exh. 2). Rene Mercado has, at all relevant times, served as the Union's president.⁶ The parties' current agreement is expired, and they are attempting to negotiate a successor contract.

² Unless otherwise stated, factual findings arise from joint exhibits, stipulations and undisputed evidence.

³ TTS repaired Kalmars (i.e., a brand of freight handling equipment), which includes cranes, forklifts and tractors.

⁴ Its major clients include Trailer Bridge, Inc. and Sea Star Lines.

⁵ There are roughly 60 employees in the Intership unit.

⁶ In June 2015, the Union was placed under a trusteeship, and Mercado was ousted. (CP Exh. 1).

2. MTS

MTS, a wholly-owned Intership subsidiary, repaired and refurbished containers,⁷ chassis,⁸ and reefers.⁹ It employed mechanics, welders and painters, and mainly served Intership,¹⁰ although it also had a few outside clients.¹¹ Luis Ruiz was its General Manager.

3. TTS

TTS, a wholly-owned Intership subsidiary, was a motor vehicle repair shop, which repaired Kalmar and other vehicles; it primarily served Intership. Sosa was its General Manager; Ernesto Davila was an Operations Manager; Daren Ryan-Oppenheimer (Ryan) was an Assistant Operations Manager; and Noel Lopez was a supervisor. Sosa set benefits and policies,¹² assigned, scheduled, and discharged workers. (R. Exhs. 28, 31-34). TTS handled its own unemployment insurance issues and had its own personnel manual. (R. Exhs. 32, 34, 35).

B. Interrelationship between the Entities

1. Leadership

This chart describes Respondent's hierarchy and leadership:

Name	Intership Title	MTS Title	TTS Title
C. Alvarez	PRES. OF BD. OF DIR.	SAME ROLE	SAME ROLE
Segarra	PRES. & MBR. OF BD. OF DIR.	SAME ROLE	SAME ROLE
S. Alvarez	VP & MBR. OF BD. OF DIR.	SAME ROLE	SAME ROLE
M. Dubron	SEC. & MBR. OF BD. OF DIR.	SAME ROLE	SAME ROLE
J. Alvarez	UNDERSECRETARY	SAME ROLE	SAME ROLE
P. Alvarez	TREASURER	SAME ROLE	SAME ROLE
L. Alvarez	UNDERTREASURER	SAME ROLE	SAME ROLE
Caraballo	CHIEF FINANCIAL OFFICER	SAME ROLE	SAME ROLE
A. Vasquez	COO	SAME ROLE	SAME ROLE
Quinones	CONTROLLER	SAME ROLE	SAME ROLE
Ruiz	TERMINAL SUPERVISOR	G.M. UNTIL CLOSURE	NO ROLE
Sosa	VP - MAINTENANCE	TECH. SUPPORT MGR.	GM FROM 2011 TO CLOSURE
Lopez	NO ROLE	PROCUREMENT SPEC.	SPECIAL PROJECT SUP.
Davila	NO ROLE	OPERATIONS MGR.	OPERATIONS SUP.
Nogueras	VP - CRANE DIVISION	NO ROLE	NO ROLE
R. Rivas	TERMINAL SUP.	NO ROLE	NO ROLE
J. Martinez	SECURITY OFFICER	NO ROLE	NO ROLE

(JT Exhs. 1, 6-8, 17-19, 20; GC Exhs. 17-20).

⁷ Containers are 20 or 40-foot long, steel, rectangular boxes that hold freight.

⁸ Chassis are wheeled, steel frames, which transport containers.

⁹ Reefers are refrigerated containers.

¹⁰ Intership could not do such work under the E.P.A. rules, which prohibit sandblasting and painting at the docks.

¹¹ MTS also serviced Trailer Bridge, Sea Star and other clients.

¹² He selected health and dental providers. See (R. Exh. 27).

2. Collaboration

a. Services

Before closing, MTS serviced Intership's chassis and equipment.¹³ (GC Exhs. 56-58).¹⁴ Frank's Chassis & Repair now performs these services. Before closing, TTS serviced Intership's Kalmar's, which were either repaired on-site,¹⁵ or transported by MTS. (GC Exhs. 27, 35). Tribo Tech now performs these services.

b. Funding and Inventory

Intership loaned MTS funds for equipment, payroll and supplies. (GC Exh. 10). Intership's Quinones signed checks for MTS' utilities and other bills. (GC Exhs. 7-9). Intership also loaned TTS monies for operating expenses; Caraballo and Vasquez signed these checks. Intership paid TTS' utility and credit card bills, and accepted reimbursement. (GC Exhs. 13-16). MTS also purchased inventory for TTS. (GC Exh. 46). TTS' purchase orders, machinery and uniforms bore an MTS logo (GC Exh. 34). Intership owned MTS' and TTS' facilities.

c. Common Labor Policy and Interchange

MTS did not have a human resources department; such matters were handled by Intership. When MTS hired, the worker and Intership's Figueroa would jointly sign the employment contract. (GC Exh. 6). In 2005, Ruiz was assigned to MTS by Intership; in 2012, he was promoted by Intership. Ruiz considered himself an Intership employee (tr. 74-75), and continued to work for Intership, following MTS' closure.

Intership's Negron aided TTS with employee evaluations, discharges and other issues.¹⁶ (GC Exh. 52). Intership's Quinones prepared TTS' payroll. Sosa was appointed to TTS by Intership, supervised by Intership, and uniformly appeared on Intership's payroll.¹⁷ When Ryan was hired at TTS, he received his offer from Intership, signed an employment contract at Intership, and received business cards from them. (GC Exh. 12). Intership hired TTS' Lopez, and paid his wages, and then sought reimbursement from TTS.

3. Common Control

Intership held meetings, where MTS and TTS reported on their status. (R. Exh. 65). Intership's financial statements identified MTS and TTS as subsidiaries. (GC Exh. 54). Intership made the final decision to close MTS and TTS.

¹³ Intership sent MTS 8 to 10 chassis per week for servicing.

¹⁴ These exhibits were admitted after the hearing.

¹⁵ Ryan credibly testified that 99% of TTS' work was performed for Intership.

¹⁶ See, e.g., (GC Exhs. 22-25) (showing that TTS' workers were hired and fired by Intership).

¹⁷ Sosa received business cards from both Intership and MTS. (GC Exhs. 17-18).

C. September to October 2012 – MTS' Election and Closure

1. Petition

On September 20, 2012, the Union filed a petition seeking to represent these MTS employees (the MTS unit):¹⁸

All full-time mechanics, welders, utility, tire repair, and maintenance employees employed by ... [MTS], but, excluding all other employees, managers, supervisors and guards as defined in the Act.¹⁹

(JT Exhs. 1, 9–10).

2. Pre-Election Events

a. General Counsel's Position

Jose Nater-Maisonet (Nater), an MTS employee, stated that, in September 2012, Ruiz asked him whether he had spoken to the Union, told him to tell his coworkers to “side with the Company,” warned that MTS would find out who signed Union cards, and threatened that “if the Union ever came into MTS, the gates would close.” (Tr. 206). Socrates Escotto-Polanco (Escotto), an MTS employee, recalled a similar exchange. Escotto stated that, in September 2012, Ruiz asked him whether he had heard any Union rumors, told him to identify their supporters, and threatened that MTS would close, if it unionized. Jose Velasquez, an MTS painter, said that in September 2012, Ruiz: told several workers that, if he learned who signed Union cards, he would suspend them (tr. 241); said that MTS “would not accept ... a union” (tr. 242); and asked him who was leading the Union’s campaign.²⁰

b. Respondent's Position

Ruiz recalled hearing about the Union in September 2012, but, denied interrogating or threatening workers. He said that he discussed the Union with a small group, whom he only advised that the Union was not a good idea, but, remained their choice.

c. Credibility Resolution

Given that Ruiz denied the allegedly unlawful remarks at issue, and eight workers stated otherwise, a credibility resolution must be made. For several reasons, I credit the several employees, who were consistent and forthright. It is implausible that these employees collectively concocted their stories, and still remained able to recount Ruiz’s actions with such

¹⁸ On September 21, the RC Petition was faxed to Segarra, who serves as tripartite role as Intership’s, MTS’ and TTS’ president. (GC Exh. 36; tr. 838).

¹⁹ There were 16 employees in the unit. (JT Exh. 11B).

²⁰ MTS employees Bryan Alvarado, Luis Allende, Jason Marrero, Angel Alfredo-Garcia (Alfredo) and Angel Garcia Pabon (Garcia) corroborated Nater, Escotto and Velasquez, and collectively recalled Ruiz threatening plant closure and job loss, asking about their Union activities, and soliciting them to vote against the Union.

intricate detail and overall consistency. Ruiz's plant closure threats were also consistent with MTS' closure, within days of the election.

3. Election and Closure

On October 17, 2012, an election was held, which the Union won. (JT Exhs. 12-13). On October 19, without notice to the Union, MTS closed for "financial reasons." (JT Exh. 14). On October 30, the Union sought decisional and effects, which was not granted. (JT Exhs. 15, 20).

4. Closure Rationale and Circumstances

Segarra said that he closed MTS for the following reasons: the loss of major clients (i.e., Sea Star²¹ and Mediterranean Shipping (R. Exhs 43-45)); concerns over client Trailer Bridge's bankruptcy filing (R. Exh. 42);²² and MTS' poor performance. He added that he had been evaluating MTS' potential closure since 2011. (R. Exh. 53).

Caraballo explained that Intership was under great financial duress when MTS closed, and sustained annual losses of almost \$1 million.²³ Between 2011 and 2012, Intership's net income decreased from \$4,446,071 to \$1,341,384.²⁴ (R. Exh. 60). She related that she lobbied Segarra to close MTS since 2010 because it was, "bleeding" Intership dry. (Tr. 1346). This chart summarizes MTS' net losses from 2008 through 2013:²⁵

Year:	2008	2009	2010	2011	2012	2013
Net Loss:	(\$44,073)	(\$148,639)	(\$161,186)	(\$111,488)	(\$120,834)	(\$95,063)

(R. Exhs. 48, 50, 54; GC Exh. 55). She said that MTS only survived because of Intership's ongoing loans and that the Intership Board retained an auditor in 2011 to "study the tax aspects" of MTS' potential closure. (R. Exh. 52(b)). She stated that these factors prompted MTS' closing and that the Union was never a factor. She related that MTS' assets were liquidated and its property has since been leased to Sun Colors Digital Graphics, Inc. through 2018. (R. Exhs. 56-58). She stated that, since MTS' closure, Intership is no longer engaged in the repair of third party chassis and containers for profit.

Although, as will be discussed in the analysis section, Segarra's and Caraballo's testimony about MTS' closure rationale was not credited, their testimonies regarding MTS' and Intership's ongoing losses and poor fiscal performance were credited, and supported by voluminous financial records and statements.

²¹ Segarra alleged that this loss resulted in a 33% decrease in Intership's revenue.

²² Caraballo said that this filing stopped Intership from collecting over \$700,000 owed by Trailer Bridge.

²³ Intership lost \$789,000 between September 2011 and September 2012. (R. Exh. 46).

²⁴ Intership's financial problems were captured in its consolidated financial statements for 2013 and 2014, which reflected net losses of \$1,463,740 and \$1,087,910 respectively. (R. Exh 67). Caraballo noted that Intership responded to this crisis by undergoing a drastic cost reduction program. See (R. Exh. 65).

²⁵ MTS' deficit, i.e., a running total of yearly losses, was \$740,778 at the end of 2013. (GC Exh. 55).

D. October 2012 to March 2013 – TTS Closure Threats and Shutdown**1. Closure Threats****a. General Counsel's Position**

Yamil Colon-Santiago (Colon), a TTS employee, related that, after MTS' closure and Union organizing drive, Davila called him and other workers to a meeting, and warned that MTS closed because of the Union. (Tr. 392). He stated that Ruiz said that, if TTS also unionized, it would close. (Tr. 394). He recalled that, in December 2012, Sosa and Lopez repeated these closure threats. (Tr. 394). Edgar Alejandro-Diaz (Alejandro) testified that Lopez told him that MTS closed because of the Union, and Lopez and Sosa both said that, if TTS unionized, it would similarly close. John Rosa-Guadalupe (Rosa) provided a similar account. (Tr. 807-808).

Ryan, a TTS supervisor, related that he was told by Sosa and Davila that MTS closed because it unionized. (Tr. 713-15). He said that, in March 2013, Davila told him that he should tell employees that, if they also unionized, TTS would close and they would be fired. (Tr. 716). He recalled Sosa threatening TTS' closure, if employees unionized. (Tr. 717). Ryan related that he was convinced that TTS would unionize, and recalled employees telling him that they were talking to the Union about organizing. He said that he relayed these discussions to Sosa in September, in order to offer him a chance to remedy employees' concerns before they unionized.

b. Respondent's Stance

Sosa denied knowing that TTS employees were considering unionizing. He and Lopez each denied threatening job loss or plant closure.

c. Credibility Resolution

Given that Ryan, Rosa, Colon and Alejandro reported repeated threats, which Sosa and Lopez each denied, and Ryan said that he told Sosa that TTS employees' were organizing, which also Sosa denied, a credibility determination must be made. For several reasons, I credit Ryan, Rosa, Colon and Alejandro. First, their testimony was deeply consistent and their demeanors were uniformly strong. Second, their testimony was supported by TTS' and MTS' actual closures shortly, after the advancement of the alleged threats at issue. Finally, I found Sosa and Davila to be less than credible witnesses, whose comments were deeply consistent with the slew of unlawful threats and actions present herein.

2. Closure

On April 26, 2013, TTS closed and discharged its employees.²⁶ Its facility stands vacant and is being marketed by a realtor. Caraballo and Segarra explained that TTS closed for the same reasons that befell MTS (i.e., Intership's and TTS' business problems and losses).²⁷ Sosa stated that Intership continuously loaned TTS monies to meet expenses. He said that he reported

²⁶ The Union had not filed a petition seeking to represent TTS employees, when it closed.

²⁷ (R. Exh. 26) (TTS' total losses in 2012 were \$891,685).

on TTS' exigent financial condition at Intership's Executive Meeting on April 15, 2013 and lobbied for its closure.²⁸ (R. Exh. 65). He said that, shortly thereafter, Segarra closed TTS.

Although, as will be discussed in the analysis section, Segarra's, Caraballo's and Sosa's testimonies about TTS' closure rationale were not credited, their testimonies regarding TTS' and Intership's poor fiscal performance were credited, and corroborated by financial records.

E. July 17 to 21, 2014 Strike and Demonstration

On these dates, Intership and MTS employees picketed and held a short-term strike outside of Intership. Picketing occurred around-the-clock and protested MTS' closure. The Puerto Rican Police Department continuously observed the strike. Although Respondent averred that the picketers blocked Intership, the police never cited or stopped them. Region 24 never issued a complaint against the Union, which alleged unlawful blockage.

Arturo Figueroa Rios (Figueroa), former Union attorney, testified that several supervisors observed the picketing. He identified: Rodriguez; Nogueras; Jose Garcia-Ortiz (Garcia), VP-Terminal Operations; Sosa; and Caraballo. He explained that management monitored the picketing from their cars and the gate, and took photos and video footage with their mobile phones. He stated that he asked management to stop intimidating the picketers, but, was ignored. He recollected that, on one occasion, Rodriguez parked his car next to the picket line and took pictures with his phone for an hour. He said that, when he asked him to stop, he replied that he "had instructions to inform [on] who was there and that he would continue to follow ... the[se] instructions."²⁹ (Tr. 343). Miguel Ortiz-Rivera (Ortiz), an employee, corroborated that he heard Figueroa tell Rodriguez not to take photos and Rodriguez reply that he was following orders. (Tr. 379).

Garcia acknowledged taking photos and video to substantiate blockages. (R. Exh. 18). He insisted that the picketers blocked the gate, but, said that the police did not agree. Sosa testified that he was there on July 17 and 21 (see (R. Exh 39)); he denied monitoring employees on July 17, but, recalled taking photos on July 21. See (R. Exh. 41). He stated that he took pictures because an unnamed truck driver reported being followed by a car. Rodriguez conceded that he videotaped the demonstration. He denied, however, stating that he was told by management to record the picketers, and said that only took pictures to substantiate blockages.

F. July 21, 2014 – Rene Conception-Sanchez Incident

1. General Counsel's Stance

Rene Conception-Sanchez (Concepcion), an employee, testified that, on July 21, while talking to a trucker about the strike, Caraballo pushed him and ordered the driver to make his delivery. He said that, during this dispute, Caraballo asked if he was the leader and when he did not respond, Sosa grabbed him and ordered him to reply. He said that Caraballo threatened him that Intership would close, if employees continued. (Tr. 441). Javier Martinez-Ortiz (Martinez)

²⁸ Sosa said that TTS' problems were exacerbated by the loss of several clients. See (R. Exhs. 36-37).

²⁹ He agreed, on cross examination, that there are dock areas, which are videotaped for security reasons. (Tr. 359).

corroborated his account.

2. Respondent's Stance

Caraballo testified that, on July 21, she told the truck driver to enter the facility. She contended that Concepcion hit her with his umbrella, while she spoke to the driver and pushed her. She said that she alerted the police, who asked the parties to separate and warned the picketers to not block the gate. Sosa recalled a truck driver seeking to enter with a delivery, and recollected Concepcion, pressing against Caraballo and inserting himself in her discussion with the driver. He denied grabbing Concepcion, or witnessing any threats.

3. Credibility Resolution

Given that Concepcion said that Caraballo pushed and threatened him and that Sosa grabbed him, a credibility resolution is needed. Concepcion is credited over Sosa and Caraballo. First, his willingness to testify against high-level superiors without an obvious financial stake enhances his credibility. Second, he had a credible demeanor; he was open and consistent. His testimony was corroborated by Martinez, who was equally credible. Third, if Concepcion had actually struck Caraballo with his umbrella as she related, he would surely have received discipline. The absence of such discipline, consequently, undercuts her credibility. Finally, Caraballo and Sosa seemed more committed to supporting Intership's position than offering candid testimony.³⁰

G. July 2014 – Caraballo and Segarra Comments

Rivera testified that, after employees returned from the strike, Caraballo said that, if employees continued, “we would be destroying the company and left without a job.” (Tr. 499). Rafael Hernandez-Alicea (Hernandez) testified that Segarra told him that, if the Union continued, Intership could close. (Tr. 547). He added that Caraballo noted that she did not see him at the strike and told him to “wait until the company closes.” (Tr. 549–50). Segarra and Caraballo denied such commentary, which triggers another credibility analysis favoring Rivera and Hernandez, who were consistent witnesses, with strong demeanors. Moreover, the threats at issue are so deeply consistent with the myriad of other unlawful statements and actions present herein that Caraballo's and Segarra's denials have been rendered practically worthless.

H. Unilateral Change Allegations

1. Vacation Pay Procedure

Concepcion, an employee since 1987, said that Intership had a consistent practice of distributing vacation checks at the terminal on the Friday before a vacation. He related that, after the July 2014 strike, he was required to pick up his vacation check at the main office, which required a 30-minute drive. Jose Rivera-Sanchez (Rivera) corroborated this account. Mercado testified that Intership did not bargain over this change, or notify the Union before

³⁰ Regarding Sosa, if he were fully credited on every contested point, such a finding would mean crediting him over at least 10 other witnesses, which is implausible.

implementation. Caraballo conceded making the change and cited confidentiality issues.

2. Maintenance Workers' Hours

a. General Counsel's Position

Rivera testified that maintenance employees in the Internship unit previously worked at least 40 hours per week. He said that, after the July 2014 strike, their work schedules were reduced to 24 hours per week. He related that he did not return to his normal schedule until November 2014. Juan Delgado related that he consistently worked 40 hours before being cut to 32 hours per week in July 2014. Ramon Duran-Colado (Duran) provided similar testimony. Mercado testified that Internship never notified him or bargained over this issue.

b. Respondent Stance

Gerardo Rosa-Garay (Rosa), Internship's Maintenance Manager, and Garcia testified that unit maintenance employees periodically worked 40 hours per week, subject to the availability of sufficient work. They disputed whether they always worked 40 hours per week, and said that they generally worked "as needed." They stated that a standing seniority list governs who is scheduled to work (R. Exhs. 12-13), and insisted that maintenance workers are not guaranteed a full-time workweek.³¹ They conceded that the 2 most senior mechanics mostly work 40 hours per week, while their less senior counterparts work fewer hours.

c. Credibility Resolution

This credibility resolution favors Rosa and Garcia. First, Rivera, Delgado and Duran offered generalized and conclusory testimony about their workweek, whereas Rosa and Garcia provided persuasive and detailed accounts. Second, it is noteworthy that Counsel for the General Counsel failed to buttress this allegation with sufficient work schedules and pay records, which would have established a consistent and long-term scheduling practice in the maintenance department.³² This conspicuous evidentiary lapse solidly resolves this credibility dispute in favor of the Respondent. Finally, absent such records, it is plausible that maintenance employees were assigned "as needed," in accordance with seniority.

3. 8-Hour Auto Checker Guarantee

a. General Counsel's Stance

Checkers inspect, receive, dispatch and load cargo. Rafael Hernandez-Alicea (Hernandez), a checker, testified that he performed automobile checker work three times in May 2014, and was only paid for actual hours worked. He explained that he did not receive the guaranteed 8 hours of pay for such work, which was previously paid.³³ Jose Colon-Rodriguez (Colon), a checker, testified that he was uniformly paid the 8-hour guarantee, irrespective of

³¹ Mercado agreed, on cross, that there are some unit employees, who do not work 40 hours per week. (Tr. 1053).

³² Such evidence, which should have been readily obtainable, would have persuasively demonstrated this point.

³³ On these dates, he worked 6, 7 and 4 hours, and averred that he should have been paid for 8 hours each day.

where he worked until December 2014, when Intership ended this practice. Mercado testified that Intership never notified him about this change or bargained over it.

b. Intership's Response

Garcia stated that checkers at the main gate, which he referred to as "under the canopy," received an 8-hour guarantee, even if they worked less than 8 hours. He related that checkers in the terminal, which he referred to as "in the yard," were only paid for actual hours worked. He explained that checkers only received an 8-hour guarantee under these circumstances:

When the checkers are assigned to dispatch autos are ... assigned to our clients' gates, being Sea Star Lines or Trailer Bridge, ... they are guaranteed 8 hours....

(Tr. 936). Garcia added that "in the yard" checkers only receive a 4-hour guarantee and, thereafter, are paid for actual hours worked. He said that checkers also receive a 4-hour guarantee, when working on vessels. He explained that GC Exhs. 32-33 demonstrate that Intership did not pay the 8-hour guarantee between September 2014 and March 2015.³⁴

c. Credibility Resolution

This factual dispute has been resolved in favor of Respondent. First, the dearth of pay records demonstrating a consistent practice weighs in its favor. Second, Garcia's detailed testimony was persuasive, his account was plausible, and his demeanor was superior.

4. Auto Checker Designation

The evidence presented by the General Counsel on this matter was, at best, meager. Mercado testified that Intership had a designated auto checker, until it ceased this practice in January 2015, without notice or bargaining. Garcia explained that Intership would inconsistently appoint a designated auto checker, on the basis of client needs.³⁵ For many of the reasons previously cited, Respondent wins this credibility dispute. As stated, Garcia was very credible. Additionally, the conspicuous lack of business records demonstrating the existence of a consistent practice on this issue deeply undercuts Mercado's generalized testimony.

I. Suspension – Efrain Gonzalez Andino

On July 9, 2014, Efrain Gonzalez-Andino (Gonzalez) received this memo:

[O]n May 30 ... you failed to follow a posted ... guideline ... [and] used profanity towards a Manager of ... Trailer Bridge....

On countless occasions, we have notified you ... that all union personnel only receives instruction from ... Intership; and ... if any ... claim emerges ... [it has]

³⁴ Although the GC offered an exhibit showing that a checker received 8 hours of pay for less than 8 hours of work, when not at the main gate, Garcia claimed that this was an isolated error.

³⁵ As an example, Garcia said that he would appoint a checker, when freight had 2 makes of cars mixed together.

to be addressed directly to Internship management.... [Y]ou blatantly violated these ... guidelines and ... used profanity towards a [client's] manager....

[W]e have decided that [a] ... June 2, 3rd and 4th [suspension is warranted]

(GC Exh. 30).

Gonzalez recalled that, on May 30, he observed Trailer Bridge supervisor Ronald Ortega performing Internship unit work. He said that, in his role as a shop steward, he inquired. He recollected Ortega first ignoring him and then responding with profanity, which prompted him to reply in kind. He added that Ortega then told him that the Union had consented to this work arrangement, which the Union later acknowledged. He contended that, although he does not generally interact with customers, he was allowed to do so as a shop steward.

Garcia stated that employees are prohibited from speaking to clients, in order to avoid disputes like the one at issue herein.³⁶ He related that there are no exceptions and employees can always phone him, whenever an issue arises. He said that he received 2 complaints from Trailer Bridge regarding Gonzalez' undisputed actions. (GC Exh. 47; R Exh. 11). He agreed that Gonzalez was not the instigator, and denied that his steward status factored into his discipline.

III. Analysis

A. Single Employer Status³⁷

Internship, MTS and TTS are a single employer. The Board has held that:

In determining whether ... nominally separate employing entities constitute a single employer, ... four factors [are relevant]: (1) common ownership, (2) common management, (3) interrelation of operations, and (4) common control of labor relations. No single factor is controlling, and not all need be present. Rather, single-employer status ultimately depends on all the circumstances. It is characterized by the absence of an arm's-length relationship. . . .

Cimato Bros., Inc., 352 NLRB 797, 798 (2008). Centralized control of labor relations is the primary factor in this analysis. *Geo. V. Hamilton, Inc.*, 289 NLRB 1335, 1337 (1988). "[C]ommon ownership, while significant, is not determinative in the absence of centralized control over labor relations." *Mercy Hospital*, 336 NLRB 1282, 1284 (2001).

1. Common Ownership and Management

These factors favor single employer status. MTS and TTS were owned by Internship. Segarra, Internship's president, presided over MTS and TTS. Internship held Board meetings, where MTS and TTS reported on their status and decisions regarding their closings were made. All entities have common managers (e.g., VP, Sec., Treasurer, CFO, COO and Controller).

³⁶ See also (GC Exh. 51) (citing undisputed workplace rule regarding customer interactions).

³⁷ This allegation is pled in par. 5 of the first complaint.

2. Interrelationship of Operations

This factor favors single employer status. Before its closure, MTS serviced Intership, its main customer. MTS' Ruiz transferred to Intership, after MTS closed. Before its closure, TTS serviced Intership, its main customer.³⁸ TTS' Sosa transferred to Intership, after TTS closed. Intership financed MTS and TTS.³⁹ MTS purchased inventory for TTS. TTS' purchase orders bore an MTS logo. TTS' machinery and employee uniforms had MTS logos.

3. Central Control of Labor Relations

This factor supports single employer status. MTS lacked an HR department and delegated this duty to Intership. When MTS hired a worker, the employee and Intership's Figueroa would sign the contract. Ruiz was assigned to work at MTS, and later promoted by, paid by, and supervised by Intership.⁴⁰ Concerning TTS, there is mixed evidence of centralized control, which tips in favor of labor relations control. On the negative front, TTS' Sosa independently: made many operational decisions; determined benefits and assignments; assisted discharge decisions; set many workplace policies; and handled unemployment insurance. TTS had its own Employee Manual. On the positive side, however, Intership: prepared TTS' payroll; appointed TTS' Sosa, supervised him and paid him; appointed TTS' Lopez and paid him; and hired TTS' Ryan and supplied his business cards. Also, in spite of Sosa's contrary testimony on independence, several emails demonstrate that Intership still assisted with evaluations, terminations and other personnel matters. This evidence suggests that Intership centrally controlled the most significant labor relations matters (e.g., hiring and control of upper management and other key human resources functions) and relegated some lesser duties to TTS. In sum, this labor relations factor tips in favor of single employer status, given that there is virtually uncontradicted evidence of central control at MTS, and evidence of central control over the most important labor relations matters at TTS.

4. Conclusion

Respondent is a single employer; all factors were satisfied. In sum, there is a clear lack of an arm's length relationship between Intership and its subsidiaries.

B. Section 8(a)(1) Allegations

1. Interrogations⁴¹

Respondent unlawfully interrogated its workers. Ruiz asked: Nater if he had spoken to the Union; Escotto whether he had heard any Union rumors and would identify their supporters; and Velasquez who supported the Union. Caraballo asked Hernandez why he was not at the

³⁸ Ryan credibly described 99% of TTS' workload as involving repairs for Intership.

³⁹ Intership's Quinones signed checks, while Intership's Caraballo and Vasquez signed checks for TTS.

⁴⁰ Ruiz considered himself an Intership employee, while at MTS.

⁴¹ These allegations are listed under pars. 11 and 16 of the complaint in Cases 24-CA-091723 and 24-CA-104185 (the first complaint), and pars. 8 and 10 of the second complaint.

strike.

In *Westwood Healthcare Center*, 330 NLRB 935 (2000), the Board held that the following factors determine whether an interrogation is unlawful:

- (1) The background, i.e. is there a history of ... hostility and discrimination?
- (2) The nature of the information sought, e.g., did the interrogator appear to be seeking information on which to base taking action against individual employees?
- (3) The identity of the questioner, i.e. how high was he in the ... hierarchy?
- (4) Place and method of interrogation, e.g. was employee called from work to the boss's office? Was there an atmosphere of unnatural formality?
- (5) Truthfulness of the reply.

Id. at 939. In applying these factors, however, the Board concluded that:

In the final analysis, our task is to determine whether under all the circumstances the questioning at issue would reasonably tend to coerce the employee at whom it is directed so that he or she would feel restrained from exercising rights protected by Section 7 of the Act.

Id. at 940.

Ruiz's and Caraballo's queries were unlawful. First, as will be discussed, there is extensive evidence of Union animus, threats and hostility, and many of Ruiz's interrogations were accompanied by threats and unlawful comments. Second, Ruiz's queries were designed to ferret out the identity of the Union's supporters and communicated a threat of retaliation. Third, Ruiz and Caraballo are high-level managers. Finally, the queries at issue mostly occurred under intimidating conditions, i.e., one-on-one interactions.

2. Discharge, Job Loss and Plant Closure Threats⁴²

Respondent, by Ruiz, Davila, Lopez, Sosa, Caraballo and Segarra, repeatedly threatened employees in violation of the Act, as summarized below:

Date	Speaker(s)	Recipient(s)	Site	Summary
Sep. 2012	Ruiz	Nater, Escotto, Velasquez, Alvarado, Allende, Marrero, Alfredo and Garcia	MTS	<ul style="list-style-type: none"> • "[I]f the Union ... came into MTS, ... [it] would close." (Tr. 206). • If the Union won, MTS would close. (Tr. 229). • If Ruiz learned who signed Union cards, he would suspend them. (Tr. 241).
Nov. 2012	Davila	Colon and Ryan	TTS	<ul style="list-style-type: none"> • MTS closed because, "the employees became part of a union and that was not good for the company's interests." (Tr. 392).

⁴² These allegations are pled in first complaint pars. 11-12 and 16 and second complaint pars. 7-8 and 10.

				<ul style="list-style-type: none"> • “[I]f the [TTS] employees unionize[d], ... what happened to MTS, the same thing [would happen] to them, they would be fired” (Tr. 716).
Nov. 2012 to Feb. 2013	Lopez and Sosa	Colon, Alejandro and Rosa	TTS	<ul style="list-style-type: none"> • “[I]f the “Union ... [came] to TTS, ... [it] would close.” (Tr. 394). • MTS closed because of the Union. • If TTS unionized, it would close. • MTS closed because the Union “got in.” (Tr. 807). • If TTS unionized, it would also close. (Tr. 808). • Employees would be out of a job, if they unionized.
Jul. 21, 2014	Caraballo	Rivera, Concepcion and Hernandez	Inter.	<ul style="list-style-type: none"> • If employees continued their Union activities and protests, “[they] would be destroying the company and left without a job.” (Tr. 499). • All of the MTS employees were fired and that Intership’s employees would be next, if they continued to talk to the Union. (Tr. 441). • If the Union continued to strike, “just wait until the company closes down” (Tr. 549-550).
Jul. 24, 2014	Segarra	Hernandez	Inter.	<ul style="list-style-type: none"> • If the Union continued ..., Intership may close. (Tr. 547).

An employer violates Section 8(a)(1), when it engages in conduct that might reasonably tend to interfere with employees’ Section 7 rights. *American Freightways Co.*, 124 NLRB 146 (1959). In evaluating such statements, the Board, “does not consider subjective reactions, but rather whether, under all the circumstances, a respondent’s remarks reasonably tended to restrain, coerce, or interfere with employees’ rights guaranteed under the Act.” *Sage Dining Service*, 312 NLRB 845, 846 (1993).

Respondent’s repeated threats violated the Act; such threats were continuous, clear and coercive. See, e.g., *Publix Super Markets, Inc.*, 347 NLRB 1434, 1435 (2006) (supervisor unlawfully threatened discipline or discharge for concerted activity); *Braswell Motor Freight Lines*, 156 NLRB 671, 674–675 (1966); *Federated Logistics & Operations.*, 340 NLRB 255, 256 (2003) (unsubstantiated predictions of plant closure resulting from union victory are unlawful;⁴³ *Mid-South Drywall Co.*, 339 NLRB 480 (2003).

3. Soliciting Antiunion Votes⁴⁴

In September 2012, Respondent, via Ruiz, unlawfully solicited employees to vote against unionization. “[W]here an employer solicits employees to campaign against union representation . . . such solicitation violates Section 8(a)(1) without reference to whether the solicited employee’s union sentiments are known. . . .” *Allegheny Ludlum, Inc.*, 333 NLRB 734, 741 (2001), *enfd.* *Allegheny Ludlum Corp. v. NLRB*, 301 F.3d 167 (2002). Ruiz unlawfully solicited Nater to vote against the Union, and told him to tell others to “side with the Company.”

⁴³ While a plant closure prediction can be lawful, if the employer shows that it is the probable consequence of unionizing for reasons beyond its control, no showing was made. *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

⁴⁴ These allegations are pled in pars. 11 and 16 of the first complaint.

4. Impression of Surveillance⁴⁵

In September 2012, Ruiz created an unlawful impression of surveillance. At that time, he told Nater that MTS would learn who signed authorization cards on behalf of the Union. See, e.g., *Stevens Creek Chrysler*, 353 NLRB 1294, 1295–1296 (2009).

5. Surveillance⁴⁶

Sosa, Rodriguez, Caraballo and Noguera engaged in surveillance, when they recorded, photographed and otherwise monitored the July 2014 strike. An employer unlawfully “surveils employees engaged in Section 7 activity by observing them in a way that is ‘out of the ordinary’ and thereby coercive.” *Aladdin Gaming LLC*, 345 NLRB 585, 586 (2005). The Board considers, “duration of the observation, ... distance from ... employees while observing them, and whether the employer engaged in other coercive behavior during its observation.” *Id.*

Several factors support a surveillance finding. The management observers at issue (i.e., Rodriguez, Nogueras, Garcia, Sosa and Caraballo) were high-level officials, whom it was “out of the ordinary” to see at the plant gate. Their observation also occurred from a close vantage point over a 4-day period. Their viewing was accompanied by other coercive behavior, including: Rodriguez stating that he “had instructions to inform [on] who was there” (tr. 343); Sosa and Caraballo grabbing and pushing a picketer; and Caraballo stating that employees would be fired, if they persisted (tr. 441). Lastly, such monitoring was unnecessary, given that the demonstration was peaceful, and supervised by the police. These actions, were, thus, unlawful.

6. Acts of Violence⁴⁷

Respondent violated the Act, when Sosa and Caraballo grabbed and pushed Concepcion on July 21, 2014, while he was informing a trucker about the labor dispute. It is unlawful for an employer to assault or physically abuse employees because of their protected activities. *Studio S.J.T. Limited*, 277 NLRB 1189, 1194 (1985); *Federated Stores*, 241 NLRB 240, 252 (1979). Caraballo’s and Sosa’s actions were solely aimed to thwart Concepcion’s lawful discourse about the labor dispute, and were, accordingly, unlawful.

C. Section 8(a)(5) Allegations

1. Unilateral Changes

a. Legal Precedent

An employer must bargain in good faith with the collective-bargaining representative of unit employees regarding wages, hours and other terms and conditions of employment. *NLRB v. Borg-Warner Corp.*, 356 U.S. 342, 349 (1958). An employer, thus, violates the Act, when it makes material unilateral changes in mandatory bargaining topics. *NLRB v. Katz*, 369 U.S. 736

⁴⁵ These allegations are pled in pars. 11 and 16 of the first complaint.

⁴⁶ These allegations are pled in pars. 6 and 10 of the second complaint.

⁴⁷ These allegations are pled in pars. 7 and 10 of the second complaint.

(1962). In order to trigger a bargaining obligation, however, a unilateral change must be material, substantial and significant. *Crittenton Hospital*, 342 NLRB 686 (2004). The General Counsel can establish a prima facie unilateral change violation, if it shows that an employer unilaterally made a material and substantial change in a term of employment without negotiating.

5 The burden then shifts to the employer show that the change was permissible (e.g., consistent with established past practice). *Fresno Bee*, 339 NLRB 1214 (2003).

b. Vacation Procedure⁴⁸

10 Intership violated the Act, when it unilaterally changed the vacation procedure. The Board has held that vacation scheduling and related procedures are mandatory bargaining subjects, and unilaterally imposed changes in this arena are unlawful. *United Cerebral Palsy of New York City*, 347 NLRB 603, 606–607 (2006). In July 2014, Intership ceased distributing vacation checks at the plant on the Friday before a vacation, and instituted a new system, where

15 employees had to retrieve vacation checks at the main office. This material and significant change was unlawfully implemented, without bargaining or notice.

c. Maintenance Assignments⁴⁹

20 The General Counsel failed to show that Intership unilaterally changed its maintenance assignments in a material or substantial way. Unit maintenance employees never consistently worked 40 hours per week, and were, instead, assigned “as needed.” The General Counsel solely offered generalized and conclusory evidence on this point, and failed to produce sufficient work and pay records, which would have adduced a consistent practice.

d. Auto Checkers⁵⁰

25 The General Counsel failed to show that Intership unilaterally modified its auto checker procedures. The General Counsel offered a dearth of records on this matter, and Garcia’s

30 testimony that auto checker procedures remained unchanged was, as discussed, credited.

2. Closure of MTS, and Associated Discharge of the Unit⁵¹

35 MTS’ closing was a mandatory subject of bargaining under *Dubuque Packing Co.*, 303 NLRB 386, 391 (1991), enfd. in rel. part1 F.3d 24, 31–33, (D.C. Cir. 1993), pet. for cert, dismissed 146 LRRM 2896 (1994). Intership, therefore, violated Section 8(a)(5) by unilaterally closing MTS, without offering the Union a chance to bargain over this matter.

a. Legal Precedent

40 In *Fibreboard Paper Products v. NLRB*, 379 U.S. 203 (1964), the Supreme Court found that an employer’s subcontracting of maintenance work, which merely replaced existing

⁴⁸ This allegation is pled in pars. 9 and 12 of the second complaint.

⁴⁹ This allegation is pled in pars. 9 and 12 of the second complaint.

⁵⁰ This allegation is pled in pars. 9 and 12 of the second complaint.

⁵¹ These allegations are pled in pars. 13, 15 and 18 of the first complaint.

employees with those of an independent contractor performing the same work under similar conditions of employment was a mandatory subject of bargaining. The Supreme Court held that, since the subcontracting was unaccompanied by a capital investment or alteration in the entity's basic operation, requiring bargaining over such a decision "would not significantly abridge the company's freedom to manage the business." Id. at 213. Moreover, since the subcontract turned on labor costs, it was "peculiarly suitable for ... collective-bargaining." Id. at 214.

In *First National Maintenance*, 452 U.S. 666 (1981), however, the Supreme Court held that an employer's decision to close down part of its business was not a mandatory bargaining topic because that type of decision was "akin to the decision whether to be in business at all." Id. at 686. Accordingly, the "harm likely to be done to an employer's need to operate freely in deciding whether to shut down part of its business purely for economic reasons outweighs the incremental benefit that might be gained through the union's participation in making the decision ..." Id. The court left *Fibreboard* intact and stated that each case involving economic decisions that impact employees, "such as plant relocations, sales, other kinds of subcontracting, automation, etc." must be considered on its specific facts to assess whether "the benefit for ... collective bargaining ... outweighs the burden placed on the ... business." Id. at 679, 686, fn. 22.

In *Dubuque Packing Co.*, 303 NLRB 386, 391 (1991), enfd. in rel. part 1 F.3d 24, 31-33 (D.C. Cir. 1993), pet. for cert, dismissed 146 LRRM 2896 (1994), the Board announced the test for determining whether a work relocation decision is a mandatory bargaining topic. The Board held that the General Counsel has the initial burden of showing that the decision was "unaccompanied by a basic change in the nature of the employer's operation." The employer then has the burden of rebutting the General Counsel's prima facie case or proving certain affirmative defenses. 303 NLRB at 391. Where the Board concludes that the employer's decision concerned the "scope and direction of the enterprise," there will be no duty to bargain over the decision. *Noblit Bros., Inc.*, 305 NLRB 329, 330 (1992); *Holly Farms Corp.*, 311 NLRB 273, 277-78 (1993). The Employer may also avoid bargaining if it can show that (1) labor costs were not a factor or (2) even if labor costs were a factor, the union, could not have offered sufficient labor cost concessions to alter its work relocation decision. *Dubuque*, 303 NLRB at 391. Although *Dubuque* specifically concerned work relocation decisions, its principles are applicable to all "Category III" decisions, i.e., decisions that have a direct impact on employment, but, have as their focus the economic profitability of the employing enterprise,⁵² which fall within the spectrum between *Fibreboard* and *First National Maintenance*.⁵³

b. *Intership's Decision to Close MTS Should be Viewed Under Dubuque*

As a threshold matter, Intership's decision to close MTS was not a *First National Maintenance* decision. MTS was not a separate and distinct entity (i.e., it was just a cog within Respondent's single employer enterprise). Moreover, MTS' main role was to support Intership's stevedoring business by servicing its chassis. Intership's primary business, stevedoring, was effectively unchanged by the subcontract. The elimination of MTS' supporting function

⁵² *First National Maintenance*, supra, 452 U.S. at 677.

⁵³ *Westinghouse*, 313 NLRB 452 (1993), enfd. 46 F.3d 1126 (4th Cir. 1995) (*Dubuque* applicable to Category III decisions that are not *Fibreboard* subcontracting).

precludes *First National Maintenance* treatment, inasmuch as it is not the kind of “partial closing,” or going out of part of a business, at stake in *First National Maintenance*. Or put another way, Intership never stopped stevedoring, or performing chassis upkeep; the main thing that the subcontract achieved was that it redistributed Intership’s chassis upkeep function from MTS to another entity (i.e., Frank’s Chassis).

MTS’ cessation was, however, also not a clear case of *Fibreboard* subcontracting. *Fibreboard* subcontracting requires, inter alia, replacing existing employees with a contractors’ workers performing the same work under similar employment conditions, without a capital investment or alteration in the employer’s basic operation. Thus, although some portions of Intership’s subcontract support *Fibreboard* handling because it replaced MTS’ workers with Frank’s Chassis’ workers, who performed the same type of mechanical work on the same chassis under presumably similar employment conditions, other factors preclude *Fibreboard* handling. These non-*Fibreboard* factors, which elevate the MTS subcontract to a *Dubuque* issue, are as follows: (1) Intership did not just solely change the identity of the workers repairing chassis, it also disassembled MTS’ chassis operation, dumped equipment and machinery, and leased away the building (i.e., this represented a liquidation of several assets that was not present in *Fibreboard*); (2) although Intership continued to perform its main stevedoring function, MTS’ closure still represented the end of its minor business venture into repairing chassis for outside clients (i.e., this cessation of a business venture was also not present in *Fibreboard*); and (3) Intership’s decision to close MTS was, in part, driven by economic profitability, given that MTS was deeply unprofitable and could not continue without Intership’s fiscal aid. Although *Dubuque* specifically concerned work relocation decisions, its principles are still applicable to a “Category III” decision of this nature, which was a decision that had a direct impact on MTS’ workers, but, also focused upon economic profitability. *Westinghouse*, supra.

c. *Dubuque Prima Facie Case*

The General Counsel made a prima facie *Dubuque* showing. The MTS subcontract did not significantly change scope and direction of Intership’s business, inasmuch as it uniformly remained a stevedoring company. Intership continued to service constant clients, market the same stevedoring services and compete in identical markets. Such a decision, thus, remained a mandatory bargaining subject. See, e.g., *Bob’s Big Boy Restaurants*, 264 NLRB 1369 (1982) (Board held that, where shrimp processing operation was discontinued, processing equipment was sold, and another company was retained to provide processed shrimp to its restaurants, the subcontract was a mandatory bargaining subject because the employer had not changed the nature and direction of its business, and remained in its core business of providing foods, including processed, shrimp, to its restaurants); *Michigan Ladder*, 286 NLRB 21 (1987) (Board held that, where the employer stopped manufacturing ping pong tables and ladder parts, and contracted with a subcontractor to manufacture those items on its behalf, its subcontract remained a mandatory subject of bargaining); It is noteworthy that, although the MTS subcontract involved substantial capital transactions (i.e., the leasing of the MTS facility, disassembly and sale of MTS’ equipment, and cessation of performing chassis servicing for outside clients), these substantial capital transactions make this a case appropriately analyzed under *Dubuque*, rather than *Fibreboard*, but does not, independent of other rationales, require a finding that Intership changed the nature or direction of its business. See *Pertec Computer*, 284

NLRB 810 (1987), enfd. 926 F.2d 181 (2d Cir. 1991) (employer closed a facility that manufactured typewriter ribbons and cartridges, relocated some of the work, and subcontracted the rest to a Mexican manufacturer; that was not a fundamental change in the nature of the business because the employer did not change the products, manufacturing process, or technology of production, but merely was having essentially the same work done by other employees in other locations); *Summit Tooling Co.*, 195 NLRB 479 (1972), enfd. 474 F.2d 1352 (7th Cir. 1973) (where the employer stopped manufacturing and selling tools and became exclusively a tool design company, it completely closed a severable aspect of its business, which is not present herein).

d. *Dubuque* Affirmative Defenses

Intership failed to establish any *Dubuque* affirmative defenses. It solely contended that MTS' closure flowed from ongoing losses, but, wholly failed meet its evidentiary burden of showing that labor costs were not a factor in its decision⁵⁴ or that, even if such costs were a factor, the Union, could not have offered sufficient concessions to alter its decision.⁵⁵

e. *Conclusion*

In sum, Intership's decision to close MTS must be analyzed under *Dubuque*. The MTS subcontract was unaccompanied by a basic change in the nature of Intership's operation, inasmuch as it steadfastly remained a stevedoring business and only subcontracted out a supporting role, i.e. its chassis repair needs. This was, therefore, not a change in the "scope and direction of the enterprise," which obviated bargaining. It also failed to establish any *Dubuque* affirmative defenses. Thus, bargaining between the parties regarding MTS' closure should have commenced and, "once bargaining to impasse [had] occurred, [if at all] the futility of continuing [would have been] clear [and resolved]." *Pertec Computer*, supra, 284 NLRB at 810-11, n. 3. Intership's failure to take this legitimate course violated the Act.

D. *Section 8(a)(3) Allegations*

1. *Gonzalez's Suspension*⁵⁶

Intership lawfully suspended Gonzalez. It demonstrated that it would have suspended him, even in the absence of his protected activity.

a. *Legal Precedent*

The framework for analyzing whether discriminatory actions violate Section 8(a)(3) is provided under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), which requires the General Counsel to show, by a preponderance of

⁵⁴ Intership did not show that MTS' losses flowed from non-labor costs (e.g., old equipment, production inefficiencies or outdated technology), which seems intuitively unlikely, given that MTS was a simple paint and repair shop, whose viability did not seem to hinge upon the presence of cutting-edge equipment and technology).

⁵⁵ This issue was wholly ignored, inasmuch as Intership never made even a preliminary showing regarding how much money, if any, was saved by subcontracting out its chassis repair operation to Frank's Chassis.

⁵⁶ These allegations are pled in pars. 5 and 6 of the third complaint.

the evidence, that the worker's protected conduct was a motivating factor in the adverse action. This initial burden is satisfied by showing protected activity, employer knowledge and animus. If the General Counsel meets this initial burden, the burden shifts to the employer to prove that it would have taken the same adverse action, absent the protected activity. *Mesker Door*, 357 NLRB 591-92 (2011). The employer cannot meet its burden, however, merely by showing that it had a legitimate reason for its action; rather, it must demonstrate that it would have taken the same action, absent the protected conduct. *Bruce Packing Co.*, 357 NLRB 1084, 1086, 1087 (2011). If the employer's proffered reasons are pretextual (i.e., either false or not actually relied on), the employer fails to show that it would have taken the same action for those reasons regardless of the protected conduct. *Metropolitan Transportation Services*, 351 NLRB 657, 659 (2007). On the other hand, further analysis is required if the defense is one of "dual motivation," that is, the employer defends that, even if an invalid reason might have played some part in its motivation, it would have still taken the same action for permissible reasons. *Palace Sports & Entertainment, Inc. v. NLRB*, 411 F.3d 212, 223 (D.C. Cir. 2005).

b. *Prima Facie Case*

The General Counsel made a prima facie showing that Gonzalez' protected activity was a motivating factor. He was a shop steward and Intership knew of his status. There is abundant evidence of Union animus in the form of threats, interrogations, surveillance and other actions.

c. *Affirmative Defense*

In spite of a strong showing of animus, Respondent persuasively adduced that it would have suspended Gonzalez, even absent his protected activity. First, he breached a well-publicized rule prohibiting client interactions.⁵⁷ Second, he magnified his violation by using profanity against a customer. Third, Intership did not instigate the investigation; it was initiated by its client, who harbored no obvious Union animus. Fourth, Union President Mercado acknowledged the validity of the rule and did not challenge its disciplinary reach. (GC Exh. 51). Finally, Garcia's disciplinary rationale was credited and afforded great weight. I find, as a result, that, irrespective of the obvious Union animus present herein, the suspension did not flow from such animus, was reasonable in magnitude, served legitimate business interests, and would have occurred absent his shop steward status.

2. MTS Subcontract⁵⁸

The MTS subcontract violated Section 8(a)(3). Intership failed to show that it would have subcontracted out MTS' work, in the absence of employees' Union activities.

a. *Legal Precedent*

Counsel for the General Counsel contends that the discriminatory subcontract should be analyzed under *Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263 (1965). This contention is invalid; the subcontract should be properly viewed under *Wright Line*.

⁵⁷ The General Counsel failed to show that this rule was disparately enforced.

⁵⁸ These allegations are pled in pars. 13 and 17 of the first complaint.

i. Applicability of *Darlington*

In *Darlington*, an 8(a)(1), (3) and (5) case, the Supreme Court held that an employer may lawfully close its entire business for any reason; lawful or unlawful. The Supreme Court stated in footnote 5 that “no argument is made that Section 8(a)(5) requires an employer to bargain concerning a purely business decision to terminate his enterprise.” 380 U.S. at 267 n. 5. The Supreme Court further held that an employer may lawfully close part of its business, even if the closing is motivated by union animus, unless it is also “motivated by a purpose to chill unionism in any of the remaining plants of the single employer and if the employer may reasonably have foreseen that such closing would likely have that effect.” *Darlington*, 380 U.S. at 275. After the Supreme Court remand to the Board, the Board found a chilling effect sufficient to support an 8(a)(3) violation. The Fourth Circuit then enforced the Board’s initial finding that the employer’s refusal to bargain with the union after the closing violated Section 8(a)(5), relying on the 8(a)(3) violation. See *Darlington*, 165 NLRB 1074 (1967), *enfd.* 397 F.2d 760, 774 (4th Cir. 1968), *cert. denied* 393 U.S. 1023.

The *Darlington* line of cases holds that if an employer partially closes its operation with a motivation to affect union activities at its remaining plants, it violates Section 8(a)(3). *Purolator Armored, Inc.*, 268 NLRB 1268 (1984). Furthermore, an employer in such a case also violates Section 8(a)(5) in the likely event that the employer also fails to notify, and bargain with, the employees’ bargaining representative. *Parma Industries*, 292 NLRB 90 (1988). The Board has dismissed an 8(a)(5) allegation over the closing of an entire business, where the *Darlington* precedent ruled out an accompanying 8(a)(3) violation. *Milo Express, Inc.*, 212 NLRB 313, 314 (1974). Thus, in 8(a)(3) cases, *Darlington* is applied in 8(a)(5) partial closing cases, where there is no other basis upon which to argue that a bargaining obligation exists. To hold otherwise would contradict and undermine the *Darlington* principle that an employer has a right to get out of one part of its business, even if it does so because of union animus, so long as it does not attempt to gain “unfair advantage” over union supporters at its other operations. *First National Maintenance*, *supra*, 452 U.S. at 682. As the Court observed in *First National Maintenance*, Section 8(a)(3) represents the Union’s “direct protection against a partial closing decision” motivated by union animus. Accord: *D & S Leasing*, 299 NLRB 658 (1990) (cancellation of subcontract violates Sec. 8(a)(3) and (5) because of union animus); *Parma Industries*, 292 NLRB 90 (Sec. 8(a)(3) and (5) partial closing); *Mashkin Freight Lines, Inc.*, 272 NLRB 427 (1984) (Sec. 8(a)(3) and (5) closing and relocation of operations). Section 8(a)(5), independent of Section 8(a)(3), does not provide protection, direct or indirect, to a union to insist upon bargaining over an employer’s decision to partially close its business.

The instant dispute, thus, should not be considered under the business closure principles set forth in *Darlington* because Intership had a bargaining obligation for the MTS subcontract under *Dubuque*. See, e.g., *Lear Siegler, Inc.*, 295 NLRB 857, 860 (1989) (*Darlington* not applicable where employer did not cease operations, but rather transferred some work to another location and subcontracted the remaining work; *Darlington* explicitly distinguished discriminatory relocation and subcontracting from partial closings). The bargaining obligation at issue herein, therefore, renders the MTS subcontract into a non-*Darlington* matter.

ii. Applicability of *Wright Line*

Although *Darlington* may be inapplicable, the Board may still analyze allegedly discriminatory subcontracts and work transfers analogous to the MTS subcontract under the parameters set forth in *Wright Line*. See, e.g., *Plaza Properties of Michigan, Inc.*, 340 NLRB 983, 987 (2003) (unlawful subcontracting is recognized exception to *Darlington* principles); *Westchester Lace, Inc.*, 326 NLRB 1227 (1998); *Carter & Sons Freightways*, 325 NLRB 433, 438 (1998); *Joy Recovery Technology Corp.*, 320 NLRB 356 (1995), enfd. 134 F.3d 1307 (7th Cir. 1998); *Ferragon Corp.*, 318 NLRB 359, 360–62 (1995), enfd. 88 F.3d 1278 (D.C. Cir. 1996) (Table); *Handi-Bag, Inc.*, 267 NLRB 221 (1983).

b. *Prima Facie Case*

The General Counsel presented a *prima facie Wright Line* showing that Intership discriminatorily subcontracted out MTS' work. Intership knew that the MTS unit had elected the Union, which satisfies the protected activity and knowledge elements. Regarding animus, there is overflowing evidence of animus in the form of the several threats, interrogations, surveillance activities and other unlawful actions present herein. In addition, the virtually lockstep timing between the Union's election victory and MTS' subcontract strongly demonstrates animus. *La Gloria Oil & Gas Co.*, 337 NLRB 1120 (2002), enfd. 71 Fed. Appx. 441 (5th Cir. 2003).

c. *Affirmative Defense*

Respondent failed to show that it would have contracted out MTS' chassis repair work, absent the MTS unit's protected activities. Intership contention that it subcontracted out MTS' work for financial reasons is unpersuasive. First, Intership accepted MTS' mounting losses for several years without intervention, and only responded after MTS unionized. If MTS' deep losses were a valid reason, Intership would have subcontracted out the MTS operation vastly sooner. Second, even though Intership contends that it subcontracted out MTS' work because of mounting losses, it conspicuously made no showing that it saved any money via the subcontract (i.e., by offering business records showing how much money was saved by using Frank's Chassis).⁵⁹ Third, there is extensive evidence of animus, which renders any contention that the subcontract was non-discriminatory implausible. When Intership repeatedly told the MTS unit that it would close if they unionized and then fulfilled its promise within 2 short days of the Union's election victory; its anti-Union sentiments became blatant. In sum, Intership discriminatorily subcontracted out MTS' work.

3. TTS Subcontract⁶⁰

Intership discriminatorily subcontracted out TTS's work.⁶¹ Intership failed to show that

⁵⁹ Intership failed to offer records showing that MTS' losses exceeded the cost of subcontracting to Frank's Chassis.

⁶⁰ This is pled in pars. 14 and 17 of the first complaint, which was amended to reflect an April 26, 2013 closure.

⁶¹ For the same reasons considered for MTS, the TTS subcontract was not a "partial closure" under *Darlington*. Moreover, TTS was not a partial closure; it was simply a work relocation or subcontract of a single employer's (i.e., Intership) in-house Kalmar servicing division (i.e., TTS) to Tribo Tech (i.e., the new subcontractor), which left Intership's core business function (i.e., stevedoring) essentially unchanged.

it would have subcontracted out TTS' work, absent employees' protected activities.

a. Prima Facie Case

The General Counsel made a prima facie showing of a *Wright Line* violation. Ryan credibly testified that TTS employees were discussing unionizing. The several plant closure and discipline threats, and other unlawful comments and actions, establish knowledge and animus.

b. Affirmative Defense

For many of the same reasons considered for MTS above, Intership's claim that it would have transferred out TTS' work, irrespective of employees' protected activities is unpersuasive. First, its contention that it closed TTS because of mounting losses is undermined by its acceptance of TTS' mounting losses for several years without intervention. It only responded to such losses, once TTS' employees began considering unionizing. If TTS' deep losses were the true reason for the subcontract, Intership would have subcontracted out its work far earlier. Second, even though Intership contends that it subcontracted out TTS' work because of mounting losses, it again made no showing that it saved money via the Tribo Tech subcontract.⁶² Third, there is extensive evidence of animus, which renders Intership's claim that the TTS subcontract was non-invidious implausible. Finally, Intership's unlawful handling of the MTS subcontract, in violation of Section 8(a)(3) and (5) demonstrates a common scheme to use unlawful subcontracts and work transfers to thwart unionization.⁶³

4. Changing Vacation Procedure on July 24, 2014⁶⁴

Intership's alteration of the vacation procedure was found to violate Section 8(a)(5). It is, thus, unnecessary to determine whether such action also violates Section 8(a)(3), given that the resulting remedy would be duplicative. *Pennsylvania Energy Corp.*, 274 NLRB 1153 (1985).

Conclusions of Law

1. Intership, MTS and TTS, which collectively comprise the Respondent, are a single employer, and are jointly and severally liable for the violations found herein.

2. Intership, MTS and TTS are individually, and as a single employer, employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

3. The Union is a labor organization within the meaning of Section 2(5) of the Act.

4. The Union is, and at all times material times was, the exclusive representative of the employees for collective bargaining within the meaning of Section 9(a) of the Act in the following appropriate bargaining unit, which has been identified as the Intership unit:

⁶² It failed to produce any records showing that the cost of using Tribo Tech was less than TTS' deficits.

⁶³ FRE 404(b) (specific acts of misconduct are relevant to demonstrate a common scheme or plan).

⁶⁴ This allegation is pled in pars. 9 and 11 of the second complaint.

All cargo delivery and receiving employees, timekeepers and paymasters, pier custodians, maintenance workers (e.g. mechanics, welders, electricians and gasoline expenders), gatemen and tally clerks employed at Intership's Bayamon, Puerto Rico stevedoring and marine terminal facility, excluding all administrative executive employees, professionals, guards and supervisors as defined by the Act, foremen, stevedores and all other employees.

5. The Union is, and at all times material times was, the exclusive representative of the employees for collective bargaining within the meaning of Section 9(a) of the Act in the following appropriate bargaining unit, which has been identified as the MTS unit:

All full-time mechanics, welders, utility, tire repair, and maintenance employees employed by MTS at its facility located in Bayamon, Puerto Rico, but, excluding all other employees, managers, supervisors and guards as defined in the Act.

6. Respondent violated Section 8(a)(1) by:

- a. Interrogating employees about their Union or other protected activities;
- b. Threatening employees that they would be disciplined or discharged, if they engaged in Union or other protected activities;
- c. Threatening employees that it would close, if they engaged in Union or other protected activities;
- d. Soliciting employees to vote against the Union;
- e. Creating the impression that it was engaging in surveillance of employees' Union or other protected activities;
- f. Engaging in surveillance of employees' Union or other protected activities; and
- g. Threatening employees with violence and/or physically abusing them because they engaged in Union or other protected activities.

7. Respondent violated Section 8(a)(1) and (3) by:

- a. Subcontracting and transferring its operations at MTS, its subsidiary, and effective terminating the MTS unit, because of their Union or other protected activities.
- b. Subcontracting and transferring its operations at TTS, its subsidiary, and effective terminating its TTS employees, because of their Union or other protected activities.

8. Respondent violated Section 8(a)(1) and (5) by:

a. Unilaterally changing the vacation check distribution system at Intership, without affording the Union notice and an opportunity to bargain as the exclusive collective-bargaining representative of the Intership unit.

b. Unilaterally subcontracting and transferring work performed by the MTS unit, and effectively terminating the MTS unit, without affording the Union notice and an opportunity to bargain as the exclusive collective-bargaining representative of the MTS unit over this decision and its effects.

9. The unfair labor practices set forth above affect commerce within the meaning of Section 2(6) and (7) of the Act.

10. Respondent has not violated the Act in any other manner.

Remedy

Having found that Respondent committed certain unfair labor practices, it is ordered to cease and desist and to take certain affirmative action to effectuate the policies of the Act.

Although the General Counsel seeks an order requiring Respondent to restore MTS and TTS, restoration of the status quo ante is inappropriate, when it causes undue hardship. *Chinese American Sewing Co.*, 227 NLRB 1670 (1977). For several reasons, I find that the restoration of MTS and TTS will cause an undue hardship. First, Intership is presently under significant financial duress and has sustained mounting losses; therefore, requiring it to restore 2 deeply unprofitable subsidiaries, in tandem with its own losses, would create an undue hardship. Second, while Intership accelerated MTS' and TTS' closures for discriminatory reasons, it is probable that it would have eventually cut its losses and closed these unprofitable entities on its own initiative. As a result, forcing Intership to reverse this eventual course via restoration enhances an undue hardship finding. Lastly, MTS' facility has been leased through 2018, its equipment disassembled and disposed of, and over 3.5 years have passed since closure. TTS's building has also been emptied and is being marketed by a realtor, its equipment disassembled and disposed of, and over 3 years have passed since closure.

Backpay for the MTS unit should be handled as follows:

[I]n order to recreate as nearly as possible the situation that existed at the time Respondent should have bargained, and to make whole all employees of the ... [MTS unit] for any loss of pay suffered as a result of the discrimination against them, we shall order Respondent to pay employees who were employed on the date of the closure their normal wage rate from ... [October 19, 2012], until the earliest of the following conditions as met: (1) mutual agreement is reached with the Union relating to subjects about which Respondent is required to bargain; (2) good-faith bargaining results in a bona fide impasse; (3) the failure of the Union to commence negotiations within 5 days of the receipt of Respondent's notice of its desire to bargain with the Union; or (4) the subsequent failure to the Union to bargain in good faith. Of course, if Respondent decides to resume its ... [MTS

operations] and offers to reinstate the ... [MTS unit] to their same or substantially equivalent positions, its liability will cease as of that date.

National Family Opinion, 246 NLRB 521, 522 (1979).

Backpay for the TTS employees, where there was neither bargaining obligation nor unit, should be handled under the procedure set forth by *Purolator Armored*, supra (describing the backpay procedure where an employer discriminatorily and analogously closed a division, but, demonstrated that restitution would create an undue hardship). Under *Purolator Armored*, Respondent is required to offer reinstatement to each of the TTS discriminatees by either (1) reinstituting its TTS operation, at its discretion, and offering reinstatement to each of the discriminatees to their former positions or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed; or (2) offering reinstatement to each discriminatee to any positions in its existing Internship or other subsidiary operations, which they are capable of filling, giving preference to the discriminatees in order of seniority; and in the event of the unavailability of jobs sufficient to permit immediate reinstatement of all the discriminatees, place those for whom jobs are not now available on a preferential hiring list for any future vacancies which may occur in jobs they are capable of filling. Respondent shall also make the discriminatees whole by paying each of them a sum of money equal to the amount that would have been earned as wages from April 26, 2013 (i.e., the commencement of the TTS subcontract) to the date that they either secure equivalent employment with Respondent or it makes an offer of reinstatement, as stated above.

In addition to making the MTS unit and affected TTS employees whole for any loss of earnings, such employees shall be made whole for the loss of any other benefits. Backpay shall be computed on a quarterly basis from their discharges to proper offers of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). Respondent shall compensate these employees for the adverse tax consequences, if any, associated with receiving lump-sum backpay awards, and file with the Regional Director for Region 12, within 21 days of the date the amount of backpay is fixed, either by agreement or Board Order, a report allocating the backpay award to the appropriate calendar years for each employee.⁶⁵ *Don Chavas, LLC d/b/a/ Tortillas Don Chavas*, 361 NLRB No. 10 (2014); *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016).

Respondent shall also rescind the unilateral changes made to the Internship unit's vacation procedures,⁶⁶ unless it has already done so, and, henceforth, bargain with the Union concerning any contemplated changes in the wages, hours, working conditions, and other terms and conditions of employment of the Internship or MTS units.

⁶⁵ On August 17, 2015, the General Counsel filed a Motion to Amend Complaint, which sought to supplement the desired remedy by reimbursing affected employees for search for work and work related expenses caused by their loss of employment, without regard to whether interim earnings are in excess of these expenses. Normally, those expenses are considered an offset to interim earnings. But, the General Counsel seeks a change in existing rules regarding search-for-work and work-related expenses. This would require a change in Board law, which is the sole province of the Board. Therefore, I shall not include this remedial proposal in my recommended Order.

⁶⁶ There is no evidence that employees suffered any monetary losses from the changes to the vacation procedure.

Respondent shall distribute remedial notices electronically via email, intranet, internet, or other appropriate electronic means to its employees, in addition to the traditional physical posting of paper notices, if it customarily communicates with workers in this manner. *J Picini Flooring*, 356 NLRB 11 (2010).

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended⁶⁷

ORDER

Respondent, International Shipping Agency, Inc., and its subsidiaries, Marine Terminal Services, Inc. and Truck Tech Services, Inc., which constitute a single employer located in Bayamon, Puerto Rico, and other locales, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating employees concerning their Union or other protected activities;

(b) Threatening employees that they will be disciplined or discharged, if they engage in Union or other protected activities;

(c) Threatening employees that it will close, if they engage in Union or other protected activities;

(d) Soliciting employees to vote against the Union;

(e) Creating the impression that it is surveilling employees' Union or other protected activities;

(f) Engaging in surveillance of employees' Union or other protected activities;

(g) Threatening employees with violence to their persons or property and/or physically abusing them because they engage in Union or other protected activities;

(h) Subcontracting and transferring its operations at MTS, its subsidiary, and effectively terminating the MTS unit, because of their Union or other protected activities;

(i) Subcontracting and transferring its operations at TTS, its subsidiary, and effectively terminating its TTS employees, because of their Union or other protected activities;

(j) Unilaterally changing the vacation check distribution system at Intership, without affording the Union notice and an opportunity to bargain as the exclusive collective-bargaining representative of its employees at Intership in the following appropriate unit:

⁶⁷ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

All cargo delivery and receiving employees, timekeepers and paymasters, pier custodians, maintenance workers (e.g. mechanics, welders, electricians and gasoline expenders), gatemen and tally clerks employed at Intership's Bayamon, Puerto Rico stevedoring and marine terminal facility, excluding all administrative executive employees, professionals, guards and supervisors as defined by the Act, foremen, stevedores and all other employees.

(k) Unilaterally subcontracting and transferring work performed at MTS, and effectively terminating those employees, without affording the Union notice and an opportunity to bargain over its decision to subcontract and its effects as the exclusive collective-bargaining representative of its employees at MTS in the following appropriate unit:

All full-time mechanics, welders, utility, tire repair, and maintenance employees employed by MTS at its facility located in Bayamon, Puerto Rico, but, excluding all other employees, managers, supervisors and guards as defined in the Act.

(l) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.⁶⁸

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Upon request, bargain with the Union as exclusive bargaining representative of its employees in the MTS unit concerning their decision to subcontract out MTS' operations and terminate the MTS unit.

(b) Make whole the MTS unit employees in the manner set forth in the remedy section of this Decision.

(c) Make whole the affected TTS employees by either (1) reinstating the TTS operation and offering reinstatement to each of the discriminatees to their former positions or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed; or (2) offering reinstatement to each discriminatee to any positions at Intership or any other subsidiary operations, which they are capable of filling, giving preference to discriminatees in order of seniority, and in the event of the unavailability of jobs sufficient to permit immediate reinstatement of all the discriminatees, place those for whom jobs are not now available on a preferential hiring list for any future vacancies which may occur in jobs they can fill.

(d) Make whole the TTS discriminatees by paying each of them a sum of money equal to the amount that would have been earned as wages from the date of termination to the date they either secure equivalent employment or receive an offer of reinstatement, together with interest

⁶⁸ A broad order is warranted "when a respondent is shown to have a proclivity to violate the Act or has engaged in such egregious or widespread misconduct as to demonstrate a general disregard for the employees' fundamental statutory rights." *Hickmott Foods*, 242 NLRB 1357, 1357 (1979).

thereon.

(e) Compensate all affected MTS and TTS employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 12, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years for each employee.

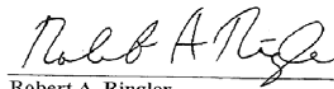
(f) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due.

(g) On request of the Union, rescind any changes made to the vacation scheduling procedure at Intership.

(h). Within 14 days after service by the Region, post at its Bayamon, Puerto Rico facility copies of the attached notice marked "Appendix."⁶⁹ Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. Respondent shall also shall duplicate and mail, at its own expense, a copy of the notice to all former MTS and TTS employees employed by the Respondent at any time since September 1, 2012. If the Respondent has since gone out of business or closed the Intership facility involved in these proceedings, it shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by it there at any time since September 1, 2012.

(i) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that it has taken to comply.

Dated Washington, D.C., March 30, 2016


Robert A. Ringler
Administrative Law Judge

⁶⁹ If this Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT interrogate employees about their Union or other protected activities.

WE WILL NOT threaten employees that they will be disciplined or fired, if they engage in Union or other protected activities.

WE WILL NOT threaten employees that we will close, if they engage in Union or other protected activities.

WE WILL NOT solicit or lobby employees to vote against the Union.

WE WILL NOT create the impression that we are watching employees' Union or other protected activities.

WE WILL NOT watch employees' Union or other protected activities.

WE WILL NOT threaten employees with violence to their persons or property and/or physically abuse them because they engage in Union or other protected activities.

WE WILL NOT subcontract and transfer our operations at MTS, our subsidiary, and effectively terminate the MTS unit, because of their Union or other protected activities.

WE WILL NOT subcontract and transfer our operations at TTS, our subsidiary, and effectively terminating our TTS employees, because of their Union or other protected activities.

WE WILL NOT unilaterally change the vacation check distribution system at Intership, without affording the Union notice and an opportunity to bargain as the exclusive collective-bargaining representative of our employees at Intership in the following appropriate unit:

All cargo delivery and receiving employees, timekeepers and paymasters, pier custodians, maintenance workers (e.g. mechanics, welders, electricians and gasoline expenders), gatemen and tally clerks employed at Intership's Bayamon, Puerto Rico stevedoring and marine terminal facility, excluding all administrative executive employees, professionals, guards and supervisors as defined by the Act, foremen, stevedores and all other employees.

WE WILL NOT unilaterally subcontract and transfer work performed at MTS, and effectively terminate those employees, without affording the Union notice and an opportunity to bargain over our decision and related effects as the exclusive collective-bargaining representative of our employees at MTS in the following appropriate unit:

All full-time mechanics, welders, utility, tire repair, and maintenance employees employed by MTS at its facility located in Bayamon, Puerto Rico, but, excluding all other employees, managers, supervisors and guards as defined in the Act.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of the rights set forth above.

WE WILL, upon request, bargain with the Union as exclusive bargaining representative of our employees in the MTS unit concerning our decision to subcontract out MTS' operations and terminate the MTS unit.

WE WILL make whole the MTS unit employees, with interest.

WE WILL, in the event that we agree to reopen MTS, offer the former MTS employees their former jobs or, if those jobs no longer exist, substantially equivalent positions.

WE WILL offer full and immediate reinstatement to each of the TTS employees who lost their positions as a result of our discriminatory subcontract of their work by either (1) reinstating our TTS operations and offering reinstatement to each of the discriminatees to their former positions or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed; or (2) offering reinstatement to each discriminatee to any position at Intership or our other existing subsidiary operations, which they are capable of filling, giving preference to discriminatees in order of seniority, and in the event of the unavailability of jobs sufficient to permit immediate reinstatement of all the discriminatees, place those for whom jobs are not now available on a preferential hiring list for any future vacancies which may occur in jobs they are capable of filling.

WE WILL make whole the TTS discriminatees mentioned above by paying each of them a sum of money equal to the amount that would have been earned as wages from the date of our unlawful TTS subcontract to the date they either secure equivalent employment with us or we make an offer of reinstatement, together with interest thereon.

WE WILL compensate affected MTS and TTS employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and **WE WILL** file with the Regional Director for

Region 12, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years of each employee.

**INTERNATIONAL SHIPPING AGENCY, INC.,
AND ITS SUBSIDIARIES, MARINE
TERMINAL SERVICES, INC., AND TRUCK
TECH SERVICES, INC., A SINGLE
EMPLOYER**

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

NLRB Region 12, Sub Regional Office, La Torre de Plaza, Suite 1002, 525 F. D. Roosevelt Avenue,
San Juan, PR 00918-1002 (787) 766-5347 Hours: 8:30 a.m. to 5:00 p.m.

The Board's decision can be found at www.nlrb.gov/case/24-CA-091723 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE
THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER. (813) 228-2455.